IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ARTHUR (GREG) LUNDEEN III, RICHARD FRENCH and JAMES M. CHAMBERLAIN	)	
Plaintiffs,	)	C.A. No. 04C-03-200 RRC
v.	)	
PRICEWATERHOUSECOOPERS LLC,	)	
Defendant.	)	

Submitted: July 21, 2006
Decided: August 31, 2006

On Defendant's Motion for Summary Judgment.
GRANTED.

On Plaintiffs' Motion for Summary Judgment.
DENIED.

MEMORANDUM OPINION

Kevin W. Gibson, Esquire (argued), Gibson & Perkins, P.C., Wilmington, Delaware, and Francis J. Curran, Esquire, Curran & Rassias, LLP, Media, Pennsylvania, Attorneys for Plaintiffs.

Gregory V. Varallo, Esquire, Evan O. Williford, Esquire, and Lisa M. Zwally, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware and Martin L. Perschetz, Esquire (argued), and Joanna Goldenstein, Esquire, Schulte, Roth & Zabel LLP, New York, New York, Attorneys for Defendant.

COOCH, J.

I. INTRODUCTION

This complex action, predicated on the alleged negligent misrepresentation by an accounting firm during the purchase of a company by another, now-defunct company, gives rise to the respective motions for summary judgment filed by Defendant PricewaterhouseCoopers LLC ("Defendant" or "PwC") and Plaintiffs Arthur (Greg) Lundeen III, Richard French and James M. Chamberlain ("Plaintiffs"). The main issue presented by Defendant's motion is whether Plaintiffs have demonstrated that there is a truly genuine issue of material fact as to whether there was a material misrepresentation in 1997 financial statements of Lason, the now-defunct company that acquired Plaintiffs' company, which financial statements were audited by PwC. The main issues presented by Plaintiffs' motion are (1) whether it was foreseeable, as a matter of law, for Plaintiffs to have relied on PwC's audits of Lason's 1997 financial statements, which is an element of negligent misrepresentation, (2) whether the facts developed in discovery demonstrate that there was, as a matter of law, a material misstatement in the relevant financial statements, and (3) whether, as a matter of law, PwC has not put forth evidence contrary to Plaintiffs' claim for damages.

Plaintiffs rely on the factual record that was established in the related

case of *Coleman v. PricewaterhouseCoopers, LLC*,[1] plus the following: (1) a supplemental expert report submitted by Plaintiffs' expert, Bennett Goldstein ("Mr. Goldstein"), which relies on the testimony of a James Reynolds ("Mr. Reynolds");[2] (2) new deposition testimony from Mr. Goldstein regarding what he had previously characterized in the *Coleman* litigation as a "hypothetical" opinion; and (3) a March 11, 2002, letter from PwC to the Securities and Exchange Commission ("SEC") that Plaintiffs contend is an admission by PwC that there were material misstatements in Lason's 1997 financial statements.

This Court holds that, despite the expanded *Coleman* record, Plaintiffs have failed to demonstrate that there is a genuine issue of material fact as to whether there was a material misrepresentation in Lason's 1997 financial statements. Since proof of that element is essential to Plaintiffs' claim of negligent misrepresentation, Plaintiffs are not able to carry their burden and PwC is therefore entitled to judgment as a matter of law. Therefore, Defendant's motion for summary judgment is **GRANTED.**

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[1] 2005 WL 1952844 (Del. Super.) (granting defendant's motion for summary judgment on the grounds that plaintiffs had failed to identify a material misstatement in Lason's 1997 financial statements, which was acknowledged by plaintiffs' expert), *aff'd*, 2006 WL 1725566 (Del. Supr.).

[2] James Reynolds was a former PwC audit manager for the Lason audit in 2000 and was a consultant to the Lason special investigation team, which investigated the financial collapse of Lason. *See Coleman*, at * 2 n.21.

As a result of the above holding, Plaintiffs' motion for summary judgment is **DENIED.**

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs' claim against PwC is for negligent misrepresentation, specifically the alleged negligence of a public accountant to a third party with whom there was no privity of contract and where the only alleged harm suffered was economic in nature.[3] Plaintiffs were the primary shareholders of Consolidated Reprographics, Inc. ("CR"), which provided reprographic services for companies located in the western part of the country.[4] In October 1997, Plaintiffs met, for the first time, certain officers of Lason, Inc. ("Lason"), a company based in Michigan, which "wanted to embark on a strategy of obtaining a significant number of companies such as CR and that [] was particularly interested in CR so as to have a 'west coast presence.'"[5] This meeting was "for the express purpose of discussing an acquisition of

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[3] This Court has earlier decided in related cases that the applicable standard for the tort of negligent misrepresentation in an accounting malpractice action lies in section 552 of the Restatement (Second) of Torts and that for an accounting firm to be held liable to plaintiffs who had no direct contractual relation to the accounting firm, "at the time [the accounting firm] was auditing [its client's] financial statements, [the accounting firm] would have had to have known (or have had reason to have known) that [its client] would share those statements with [a] class [of similarly-situated business owners who had sold their businesses to the client] or with [those] [p]laintiffs as part of a potential business transaction." *Carello v. PricewaterhouseCoopers LLP*, 2002 WL 1454111, at *4 (Del. Super.); *Coleman*, at * 1 n.1.

[4] Am. Compl. ¶¶ 8, 9.

[5] *Id.* at ¶¶ 21, 23, 29.

CR by Lason."[6] Such discussions culminated in a transaction in July 1998 where Plaintiffs sold CR to Lason and which involved a complicated deferred "Earn Out" formula that was apparently designed partly to compensate Plaintiffs based on the future performance of CR.[7] As part of the process of deciding whether to complete the sale of CR to Lason, Plaintiffs in part relied on "Lason's Annual Report, 10-K and the audited financial statements accompanying such report for the periods ending December 31, 1997, [as well as other quarterly reports and additional unaudited financial statements] for the periods prior to the July 28, 1998 close of sale."[8] "Lason's 10-K for 1997 included a report from PwC that indicated that PwC had audited Lason's financial statements in accordance with [Generally Accepted Auditing Standards] and found them to conform to [Generally Accepted Accounting Principles] and to be free of material misstatement[.]"[9]

A further chronology, similar to that in *Carello v. Pricewaterhouse Coopers LLP*[10] and *Coleman*, drawn from the Amended Complaint in this

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[6] *Id.* at ¶ 21.

[7] *Id.* at ¶¶ 52, 62

[8] *Id.* at ¶ 43.

[9] *Id.* at ¶ 47.

[10] 2002 WL 1454111 (Del. Super.).

case follows: "On December 9, 1999, in reaction to Lason's falling stock price, [Lason's C.E.O. Monroe] … announce[d] '[w]e are not aware of any reason for Lason's share price decline[ ]'";[11] "Approximately one week later … Lason announced that fourth-quarter earnings w[ould] be between 31% and 38% lower than expected[ ]";[12] "On … the next trading day, Lason's common stock fell to $11 7/8ths, from a high for the year of $64.94…";[13] "Plaintiffs did not become aware of even the possibility that Lason may have any financial problems until sometime in May of 2000[]";[14] "On March 26, 2001, Lason announced that it had informed the U.S. Securities and Exchange Commission and the US [sic] Attorney for the Eastern District of Michigan of certain accounting irregularities…";[15] "Plaintiffs subsequently learned [after CR was acquired by Lason] that Lason's reported revenues on its audited financial statements, and its 10Ks, and 10Qs, for the reporting fiscal years 1997, 1998, and 1999, which were prepared by…[PwC], were not based upon an accounting method which was in conformity with …

[11] Am. Compl. ¶ 68.

[12] *Id.* at ¶ 69.

[13] *Id.* at ¶ 74.

[14] *Id.* at ¶ 75.

[15] *Id.* at ¶ 83.

GAAP…."[16]

On December 5, 2001, Lason filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code.[17] As a result of the accounting irregularities that Plaintiffs allege existed in Lason's audited financial statements and (presumably) because of Lason's subsequent filing for bankruptcy protection, Plaintiffs aver that Lason "cannot and will not be able to" pay the "Earn Out" Plaintiffs argue is now due them as part of the CR acquisition.[18] Plaintiffs assert that PwC is liable to them "in that had [PwC] not misstated the income of Lason contrary to [Generally Accepted Accounting Principles], Plaintiffs never would have agreed to sell CR to Lason."[19]

On March 11, 2002, PwC wrote a letter that was submitted to the SEC three days later together with Lason's 2002 Form 8-K. The last paragraph of the letter reads:

> As disclosed in the March 23, 2001 Form 8-K and again in the February 21, 2002 Form 8-K, Lason management reported that a Special Committee found evidence of accounting irregularities and deficiencies in [Lason's] accounting systems which affected certain of [Lason's] financial statements, and the affected financial statements may go back to 1997.

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[16] *Id.* at ¶ 86.

[17] *Id*. at ¶ 107.

[18] *Id.* at ¶ 110.

[19] *Id.* at ¶ 133.

> We requested that Lason management include an explicit statement in the February 21, 2002 Form 8-K, that the March 26, 2001 press release and related 8-K effectively advised users and potential users that they should not rely on the quarterly and annual financial statements and our audit reports thereon for 1997 through 1999. Lason advised us that they believed such a statement was unnecessary.[20]

On August 24, 2005, after many months of discovery had been completed, Plaintiffs moved to amend Mr. Goldstein's expert report. The substance of the proposed amendment was to demonstrate that Mr. Goldstein's hypothetical that Lason had misstated income was no longer hypothetical.[21] The Court denied the motion to amend on September 6, 2005.[22]

III. CONTENTIONS OF THE PARTIES

a. Defendant's Motion For Summary Judgment

Defendant moves for summary judgment based on four independent grounds: (1) that Plaintiffs have failed to prove with admissible record

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[20] Although at oral argument on September 6, 2005, Plaintiffs indicated to this Court and to PwC that perhaps as many as 8 or 9 depositions would be taken regarding this letter, Plaintiffs apparently took but one deposition, that of William Gehrke, a partner at PwC who was involved with PwC's audits of Lason's 1999 and 2000 financial statements. Apparently, Plaintiffs also canceled the deposition of Richard Muir, another partner at PwC, who had submitted an affidavit in this case regarding the potential import of the March 11, 2002, letter. Muir, in his affidavit, stated that a request that certain financial statements and the audit report thereon no longer be relied upon is not always based on the conclusion that there is a material misstatement in the audited financial statements. Muir Aff. ¶ 5 Goldenstein Aff. to Def.'s Mot. for Summ. J., Ex. 27. Muir also stated that if such a conclusion that there was a material misstatement been reached, then the financial statements would needed to have been restated, which never occurred. *Id.* at ¶ 10.

[21] *See* Def.'s Reply 2,

[22] *Lundeen v. PricewaterhouseCoopers, LLC*, Del. Super., C.A. No. 04C-03-200, Cooch, J., D.I. 58 (Sept. 6, 2005) (ORDER).

evidence that there was a material misrepresentation in Lason's 1997 financial statements, which were audited by PwC;[23] (2) that PwC did not owe Plaintiffs a "pecuniary duty to provide accurate information;"[24] (3) that there is no genuine issue of material fact as to Plaintiffs' justifiable reliance on Lason's 1997 financial statements because Plaintiffs have not shown such justifiable reliance;[25] and (4) that Plaintiffs are not entitled to the damages that they seek because (a) Plaintiffs cannot recover the decline in the value of the Lason stock as they cannot prove loss causation and (b) Plaintiffs cannot, as a matter of law, recover rescissory damages against PwC.[26]

As to the first argument, Defendant claims that there is no genuine issue of material fact as to whether there is a material misrepresentation in Lason's 1997 financial statements "[b]ecause neither plaintiffs nor their auditing and accounting expert have identified *any* known misstatements in Lason's 1997 financial statements that would be admissible at trial."[27]

Defendant focuses on Plaintiffs' three proffers of supposed genuine issues of material fact in arguing that no genuine issue of material fact

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[23] Def.'s Mot. Summ. J. 4-9.

[24] *Id.* at 9.

[25] *Id.* at 11.

[26] *Id.* at 13-14. In light of this Court's grant of summary judgment to Defendant on its first asserted ground, this Court need not reach Defendant's other three contentions.

[27] *Id.* at 8.

exists: (1) the reliance by Plaintiffs' expert, Bennett Goldstein, on testimony given in *Carello* by James Reynolds;[28] (2) Goldstein's use of a hypothetical adjustment of amortization expense;[29] and (3) a March 11, 2002, letter by PwC to the Securities and Exchange Commission.[30] As to the first, Defendant argues that Mr. Goldstein's reliance on the Reynolds testimony is misplaced because Mr. Reynolds testified at his deposition that the "special investigators could not quantify accounting irregularities in the financial statements … and hence whether there were material misstatements could not be adequately ascertained."[31] Second, PwC contends that because this Court held in *Coleman* that Mr. Goldstein's hypothetical did not to create a genuine issue of material fact as to whether there was a material misstatement in Lason's 1997 financial statements, then it does not do so now.[32] Finally, Defendant claims that the March 11, 2002, letter does not create a truly genuine issue of material fact because the letter does not, on its face or in light of any admissible record evidence, identify a material

[28] *Id.* at 5-6.

[29] *Id.* at 5.

[30] *Id.* at 7-8.

[31] *Id.* at 6.

[32] *Id.* at 5.

misstatement in Lason's 1997 financial statements.[33]

In response, Plaintiffs argue, as a threshold issue, that this Court has improperly increased Plaintiffs' burden by requiring identification by them of a "material misstatement," instead of mere "false information."[34] In response to PwC's main contention that Plaintiffs have failed to identify a material misstatement in the pertinent financial statements, Plaintiffs claim that Mr. Goldstein and Mr. Reynolds have both identified material misstatements in Lason's 1997 financial statements.[35] Essentially, Plaintiffs rely on the three above factual submissions listed above, in addition to the factual record in *Coleman*, to demonstrate that there is a genuine issue of material fact.

First, Plaintiffs argue that Mr. Reynolds, as a Rule 30(b)(6) deponent in the *Carello* case, testified that the Special Investigation Committee, of which Mr. Reynolds was a member, "had discovered that in 1997, Lason misstated its 1997 income by at least $5,583,000."[36] Bennett Goldstein, Plaintiffs' expert, was allowed to supplement an earlier report to include this Reynolds testimony, which, Plaintiffs assert, "buttressed [their] contentions

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[33] *Id.* at 7.

[34] Pls.' Ans. to Def.'s Mot. Summ. J. 4.

[35] *Id.* at 3.

[36] *Id.* at 2-3.

in this case that there were material misstatements in Lason's financial statements which should have been caught by its auditors…"[37]

Second, Plaintiffs argue that Mr. Goldstein later testified that "his opinion that Lason misstated its income by at least 5.8M dollars is not a hypothetical opinion."[38]

Third, as for the March 11, 2002, letter from PwC to the SEC, Plaintiffs argue that that letter is an "admission that the 1997 Financial Statement was materially misstated."[39] In support of that theory, Plaintiffs submitted two affidavits, by Plaintiff Chamberlain and Richard Coleman. Plaintiffs maintain that a genuine issue of material facts exists because "Coleman, who was a former PwC auditor, establishes as a fact witness that PwC would never issue a statement that a PwC audit that was once unqualified can no longer be relied upon unless PwC discovered that there was a material misstatement in the audited financial statement."[40]

In reply to Plaintiffs' argument, Defendant argues that "[Mr.] Reynolds and the Special Committee only concluded that the 1997 financial

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[37] *Id.* at 3. Such a supplementation was not allowed by this Court in *Coleman* because of the expiration of a discovery deadline. *Coleman*, Del. Super., C.A. No. 03C-02-137, Cooch, J., D.I. 75 (Jan. 31, 2005) (ORDER).

[38] *Id.*

[39] *Id.* at 4.

[40] *Id.* at 6.

statements *may* contain material misstatements – not that they did."[41] As to the new testimony of Goldstein, Defendant contends that that testimony is based on an expert report that has been excluded in this case and, thus, such testimony should be inadmissible.[42] Defendant also relies on an uncontradicted affidavit of Richard A. Muir, the PwC partner who "signed off on the March 11 letter[,]" whose affidavit (attached to Defendant's motion) stated that "a statement by an auditor that previously issued financial statements should no longer be relied on is *not* the same thing as a statement that the financial statements were materially misstated."[43] Finally, Defendant argues that the "Chamberlain and Coleman affidavits do not qualify as either expert or lay opinion testimony, and are therefore inadmissible."[44]

b. Plaintiffs' Motion For Summary Judgment

Although Plaintiffs' motion is styled as one for summary judgment, Plaintiffs, in opposition to PwC's motion for summary judgment, argue that there are genuine issues of material fact in this case with respect to those facts on which Defendant relies. Specifically, Plaintiffs argue that the facts

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[41] Def.'s Reply 2.

[42] *Id.* at 4.

[43] *Id.* at 5.

[44] *Id.* at 6 n.7.

show that (1) that it was foreseeable that Plaintiffs would have relied upon the audits done by PwC on the relevant Lason financial statements, (2) that the March 11, 2002, letter from PwC to the SEC was an admission as a matter of law that there were material misstatements in Lason's 1997 financial statements, and (3) that because PwC has not refuted Plaintiffs' damages claim, then, should Plaintiffs prove that PwC is liable, Plaintiffs are entitled to the damages set forth in the affidavit of Plaintiff Chamberlain.[45] Plaintiffs' motion seems more in the nature of a motion *in limine*.

PwC responds that (1) it was not foreseeable that Plaintiffs would have relied on the audit reports as they were publicly available, (2) as argued above, Plaintiffs "do not point to any evidence establishing that [the audit report on Lason's 1997 financial statements] was false," and (3) as to damages, Plaintiffs must prove liability before being entitled to damages and that all of Plaintiffs' damages calculations are uncorroborated by the evidence.[46]

IV. DISCUSSION

a. Standard of Review

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter

[45] Pls.' Mot. Summ. J. 1, 2, 4.

[46] Def.'s Opp. to Pls.' Mot. Summ. J. 1, 2, 4.

of law.[47] The Court must view the facts in a light most favorable to the non-moving party,[48] and all reasonable inferences must be drawn in favor of the non-moving party.[49]

The moving party bears the burden to show that a genuine issue of material fact does not exist.[50] If the movant satisfies its burden, then it shifts to the nonmoving party, here the Plaintiffs, who must then prove that genuine issues of material fact do exist.[51] "To carry its burden, the nonmovant must produce specific facts which would sustain a verdict in its favor."[52] "The nonmovant cannot create a genuine issue for trial through bare assertions or conclusory allegations."[53] Moreover, a "party opposing a

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[47] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[48] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992).

[49] *Liberty Mutual Ins. Co. v. Devlin*, 1998 WL 283424, * 3 (Del. Super.) (quoting *Sweetman v. Strescom Indus.*, 389 A.2d 1319, 1324 (Del. Super. Ct. 1978).

[50] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

[51] *Id.* at 681.

[52] *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, * 3 (Del. Super.) (granting summary judgment for defendant on the ground that there were insufficient facts to support each of plaintiffs' claims) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) ("If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.") (citations omitted)), *aff'd*, 1994 WL 548942 (Del. Supr.). *See also* 11 James Wm. Moore et al., Moore's Federal Practice § 56.11(3) (1997) ("Facts are not 'genuinely' disputed unless the factual conflict between movant and nonmovant requires trial of the case for resolution.").

[53] *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Martin v. Nealis Motors, Inc.*, 247 A.2d 831, 833 (Del. 1968) ("Unverified allegations in the complaint do not suffice as substitute for evidence to preclude summary judgment[.]")). *See also* 11

motion for summary judgment must come forward with admissible evidence showing the existence of a genuine issue of fact."[54] The bottom line is that, and a long line of Delaware cases have so held, "[i]t is fundamental that a motion for summary judgment must be decided on the record presented and not on evidence potentially possible."[55]

Additionally, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and one which that party will bear the burden of proof at trial."[56] Also, "where the non-moving party bears the

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Moore's Federal Practice, § 56.11(7)(c) ("Just as woefully weak fact disputes do not preclude summary judgment, mere assertions can not preclude summary judgment since assertions have even less probative value than facts.").

[54] *Kennedy v. Giannone*, 1987 WL 37799 (Del. Supr.) (holding that "unsupported conclusory denials … do not constitute admissible factual evidence, and hence cannot be relied upon to raise a genuine issue of material fact"). *See also* 11 Moore's Federal Practice, § 56.11(7)(b) ("Summary judgment, like judgment as a matter of law, should be granted unless the evidence opposing summary judgment is 'substantial.' A 'scintilla' of evidence supporting nonmovant is not sufficient to defeat summary judgment.").

[55] *Rochester v. Katalan*, 320 A.2d 704, 708 n.7 (Del. 1974) (affirming grant of defendant's motion for summary judgment where plaintiff contended that an expert would testify to the malpractice of defendant-doctor, but no such testimony was ever provided). *See also Brown v. Gartside*, 2004 WL 2828061 (Del. Super.) (granting summary judgment in favor of defendant where plaintiff made general claims that paving was defective and that lighting was poor where woman fell but failed to produce specific evidence to back up her claims); *Blasi v. John P. Dugan & Son, Inc.*, 1997 WL 720715, * 3 (Del. Super.) (granting summary judgment in favor of defendant in a negligent misrepresentation case where plaintiff failed to adduce any evidence that misrepresentations had been actually made).

[56] *Manucci v. Stop n' Shop Companies, Inc.*, 1989 WL 48587, * 4 (Del. Super.) (granting summary judgment in favor of defendant where plaintiff in negligence action failed to show that certain product was defective) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317,

ultimate burden of proof on an issue at trial, the moving party may instead demonstrate that a complete failure of proof concerning an essential element renders all other facts immaterial."[57] If the moving party demonstrates a failure of proof by the non-moving party, then there is no genuine issue of material fact and summary judgment may be granted.[58]

Finally, although both parties filed motions for summary judgment, which might normally trigger Super Court Civil Rule 56(h), this Court and both parties agree that Rule 56(h) does not apply in this situation as Plaintiffs do argue, in opposition to Defendant's motion, that there are still genuine issues of material fact. Rule 56(h) only applies where "the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion." Therefore, this Court will not apply Rule 56(h) and shall not "deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[59]

322-23 (1986)).

[57] *Kanoy v. Crothall American, Inc.*, 1988 WL 15367 (Del. Super.) (granting defendant's motion for summary judgment where plaintiff in a negligence case failed to prove that a dangerous condition existed).

[58] *Manucci*, at * 4.

[59] Super. Ct. Civ. R. 56(h).

b. Plaintiffs Have Failed to Prove That There Were Material Misrepresentations in Lason's 1997 Financial Statements, An Essential Element to Their Claim, and, Thus, There Are No Genuine Issues of Material Fact.

Plaintiffs' claim is predicated on a theory of negligent misrepresentation. Plaintiffs rely on Restatement (Second) of Torts §552 - *Information Negligently Supplied for the Guidance of Others*. Section 552 states in part

> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[60]

Plaintiffs must prove all the elements of their claim for negligent misrepresentation or the claim fails. "This Court has held that a plaintiff 'cannot sustain a claim of negligent misrepresentation when it has failed to produce any evidence that the defendant … supplied false information.'"[61]

The issue, as indicated above, is whether Plaintiffs, on the record of the admissible evidence now before this Court, have identified a material misstatement in Lason's 1997 financial statements, which were then audited by Defendant. This Court finds that Plaintiffs have failed to demonstrate the

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[60] Restatement (Second) Torts §552.

[61] *Coleman*, 2005 WL 1952844, * 3 (quoting *Outdoor Technologies, Inc. v. Allfirst Financial, Inc.*, 2001 WL 541472, * 5 (Del. Super.)).

existence of such a material misstatement. Although Plaintiffs have put forth evidence that indicates that there *may* have been material misrepresentations in the relevant financial statements, that is not enough to create a truly genuine issue of material fact that can survive summary judgment. Evidence that there "may" be a material misstatement does not create a triable issue for the jury.

As a threshold matter, this Court in *Coleman* stated that to succeed on a claim of negligent misrepresentation, Plaintiffs must demonstrate the existence of a "material misrepresentation." Plaintiffs, however, claim that "[w]ithout recitation to any precedent, this Court added an element to a Plaintiffs burden under [Restatement (Second) of Torts] § 552 that is non existent in the case law or commentary that discusses § 552."[62] Instead of having to establish that "false information" was offered negligently, Plaintiffs argue that this Court requires Plaintiffs to "go[] the further mile" and show that a "material misstatement" was provided.[63] However, the case law does not support Plaintiffs' claim.[64] Therefore, this Court holds that

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[62] Pls.' Mot. for Summ. J. 3.

[63] *Id.* at 3, 4.

[64] *See, e.g., Mark Fox Group, Inc. v. E.I. duPont de Nemours & Co.*, 2003 WL 21524886, * 6 (Del. Ch.) (holding that plaintiffs had not proven defendant "made any misrepresentation of material *fact*," which is an essential element of a claim of negligent misrepresentation). *See also Adams v. Bernard*, 2003 WL 22204115, * 1 (Mass. App. Ct.) (applying § 552 in a claim of negligent misrepresentation and requiring that plaintiff

Plaintiffs' must prove that there was a "material misstatement" in Lason's 1997 financial statements.

The critical analysis, in the Court's view, is whether there is a truly "genuine" issue of material fact as to whether there was a material misstatement in Lason's 1997 financial statements. The record before the Court here is substantially similar to that in *Coleman* (with an important point being that, here, the only relevant Lason financial statement is the 1997 financial statement, as the sale of CR occurred before any subsequent PwC audits of Lason's future financial statements[65]). In *Coleman*, this Court granted summary judgment in favor of PwC because the plaintiffs there failed to identify a material misstatement in the relevant Lason financial statements. Notably, on appeal to the Delaware Supreme Court, the *Coleman* plaintiffs did "not contend that the granting of summary judgment, on the record before the Superior Court, was erroneous."[66]

The *Coleman* factual record applies to this case, but with the addition of the three factual proffers described above. The question becomes whether

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show that defendant "made a false representation of material fact"); *Bridgestone/Firestone, Inc. v. CAP Gemini America, Inc*, 2002 WL 1042089, * 5 (Del. Super.) (holding that, under Tennessee law, which uses § 552 to decide negligent misrepresentation claims, "[t]he misrepresentation must consist of a material *fact*").

[65] *See* Def.'s Mot. Summ. J. 3.

[66] *Coleman*, 2006 WL 1725566, at * 1.

that expansion of the *Coleman* record is enough to create a truly genuine issue of material fact, and not merely create the potential possibility of a genuine issue of material fact. Given the close similarity between the record presently before this Court and the record in *Coleman*, it seems best to analyze the three new proffers relied upon by Plaintiffs purportedly showing the existence of a material misstatement in Lason's 1997 financial statements.

First, this Court finds that Mr. Goldstein's supplemental report (this report being properly before the Court), which relies on the testimony of James Reynolds, a member of the Special Committee, only serves to demonstrate that Lason's 1997 financial statements *may* have been materially misstated. Although Reynolds testified that the $5,583,000 "would have had an impact on [Lason's] 1997[]" financial statements, Reynolds also testified that the Special Committee was unable to quantify any irregularities in Lason's 1997 financial statements.[67] Goldstein then relied on that testimony to opine that there was a material misstatement in the relevant financial statements. While it is true that the record evidence demonstrates that there *may* have been a material misstatement in the pertinent financial statements, Plaintiffs have not been able to specifically

[67] Reynolds 30(b)(6) Dep. Tr. 58 (March 12, 2004), Gibson Aff. to Pls.' Ans. to Def.'s Mot. for Summ. J., Ex. 1; *Id.* at 152, Goldenstein Aff. to Def.'s Mot. for Summ. J., Ex. 11.

identify a single known material misstatement. Plaintiffs have only managed to establish that there may have been a material misstatement.

However, such assertions of "potentially possible" admissible record evidence are not enough to allow this case to survive summary judgment and proceed to trial.[68] In *Brown*, the plaintiff made general allegations that the pavement was defective and that the lighting was insufficient in defendant's parking lot where the plaintiff's deceased relative had fallen. However, plaintiff was unable to bring forward any evidence that those conditions caused the fall. The *Brown* court held that there was not sufficient proof, either directly or indirectly, that could go to the jury from which it could decide what caused the fall.[69] Likewise, there is no evidence here, either directly or indirectly, that there was a material misstatement in Lason's 1997 financial statements, which were audited by PwC. In other words, there is no triable issue of fact in Reynolds' testimony and Goldstein's second supplemental opinion.

Second, Plaintiffs rely on Mr. Goldstein's June 22, 2005, deposition testimony in which Mr. Goldstein stated that an adjustment to amortization expenses that he made in a previous report was no longer hypothetical and, thus, is a material misstatement. The hypothetical put forth by Mr.

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[68] *See Brown*, 2004 WL 2828061, * 1.

[69] *Id.* at * 3.

Goldstein is the same as that in *Coleman*, which this Court held did not constitute a material misstatement.[70] There, this Court did "not disagree, nor apparently [did] PwC, with Mr. Goldstein's hypotheses," which, however, "was nothing more than assumptions that do not reflect the actual numbers used by Lason and audited by PwC."[71] This Court, in *Coleman*, held that the "bottom line is that Mr. Goldstein was not able to identify any material misstatements in the actual financial statements audited by PwC and acknowledged that fact."[72]

The issue then becomes whether Goldstein's hypothetical, which was not enough to create a genuine issue of material fact in *Coleman*, but which Plaintiffs now allege is no longer hypothetical, is enough to create a genuine issue of material fact. However, Mr. Goldstein's expert opinion is derived from a report that has been excluded in this case and, thus, cannot be the basis for any record evidence that allegedly identifies a material misstatement.[73] The *Honeywell* case is especially instructive.[74] There, the

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[70] *Coleman*, 2005 WL 1952844, * 4-5.

[71] *Id.*

[72] *Id.*

[73] *Lundeen v. PricewaterhouseCoopers*, C.A. No. 04C-03-200, Cooch J., D.I. 58 (Sept. 6, 2005) (ORDER). *See Russell v. K-Mart Corp.*, 761 A.2d 1, 3 (Del. 2000) ("In Delaware, 'the requirement of a party to comply with discovery directed to identification of expert witnesses and disclosure of the substance of the expected opinion is a pre-condition to the admissibility of expert testimony at trial.'") (quoting *Bush v. HMO of Delaware, Inc.*, 702

Court created a schedule for the submission of expert reports, which was then apparently followed by depositions. At one deposition, the proposed expert testified as to a theory that had not been included in his expert report. The Court held that as the expert's position on that theory was only supported by deposition testimony and was not a part of his expert report, that party was barred from relying on the deposition testimony.[75] The Court reasoned that, as expert testimony is limited to information within the expert's report, such a theory outside that scope can not be relied upon in deciding a motion for summary judgment.[76]

Here, as in *Honeywell*, an expert's report did not include an expert opinion that was testified to by the expert at his deposition. Although Mr. Goldstein supported his position that his theory was no longer hypothetical in his Supplemental Expert Report, that Supplemental Expert Report has been excluded from this case and can not be considered to be a part of his expert report. Therefore, Mr. Goldstein's *ipse dixit* testimony that his once-hypothetical is no longer hypothetical, which is relied upon by Plaintiffs,

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A.2d 921, 923 (Del. 1997)). *See also Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 289 F.Supp.2d 493, 500 (D.Del. 2003) (holding that the "testimony of expert witnesses is limited to the information contained in their expert reports").

[74] *Honeywell*, 289 F.Supp.2d, at 500.

[75] *Id.*

[76] *Id.*

cannot create a genuine issue of material fact.

Last, is the March 11, 2002, letter from PwC to the SEC, which has become the centerpiece of Plaintiffs' attempt to identify a material misstatement in Lason's 1997 financial statements. However, this too falls short of the proof needed at this stage to defeat PwC's motion. The letter merely states that "the affected [Lason] financial statements may go back to 1997." While this letter serves to show that there *may* have been material misstatements in Lason's 1997 financial statements, it does not state that there *are* material misstatements nor does it indicate the type or content of any material misstatement.[77] As is clear under the Delaware case law, this Court may not decide a motion for summary judgment upon evidence that is "potentially possible."[78]

Plaintiffs also submitted the affidavits of Plaintiff Chamberlain and Coleman in support of the theory that PwC would not have asked that the audit reports done in connection with Lason's 1997 financial statements not be relied upon in the future had the financial statements not been materially misstated. However, neither affidavit constitutes admissible evidence as

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[77] *See Trenwick America Litigation Trust v. Ernst & Young, LLP*, 2006 WL 2434228, * 37 (Del. Ch.) (dismissing complaint where plaintiff, among other things, did not "identify a single violation of generally accepted accounting principles or any other specific material misstatement of financial fact in the relevant financial statements[,]" but only alleges "that the financial statements were false in some unspecified way").

[78] *Rochester*, at 708 n.7.

neither person had personal knowledge of the letter nor were they offered as expert witnesses.[79] As this Court can only consider admissible evidence in deciding a motion for summary judgment, neither of those affidavits will be considered here.

Therefore, Plaintiffs have failed to identify a material misstatement in Lason's 1997 financial statements despite the expanded record in this case. Although it is possible that there may have been material misstatements in the relevant financial statements, such speculation of evidence that is "potentially possible" is not enough to allow the case to proceed to trial.[80] Plaintiffs have not pointed to sufficient point to admissible record evidence that showed the existence of a material misstatement, even looking at the evidence in a light most favorable to them. No *genuine* issue of material fact has been shown by Plaintiffs to exist on this issue. Thus, they have not carried their burden on an essential element. This is fatal to their opposition of PwC's motion for summary judgment. As a result, there are no truly genuine issues of material fact and Defendant's motion for summary

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[79] Neither Coleman nor Plaintiff Chamberlain were identified as expert witnesses, despite their respective affidavits indicating that the expressed opinions were based on experience as a Certified Public Accountant (Coleman) and as a Certified Management Accountant (Plaintiff Chamberlain). *See* D.R.E. 702. Moreover, neither had "personal knowledge" of the letter itself, as neither had been involved in drafting it, and thus, neither could be a competent fact witness. *See* D.R.E. 701.

[80] *See Rochester*, at 708 n.7; *Blasi*, at 1997 WL 720715, * 3.

judgment must be **GRANTED.**

V. CONCLUSION

For all of the foregoing reasons, Defendant PricewaterhouseCoopers' Motion for Summary Judgment is **GRANTED.**[81] Finally, as a result of this holding, Plaintiffs' "Motion for Summary Judgment" is **DENIED.**

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Richard R. Cooch, J.

oc: Prothonotary

[81] The Court notes that at the time this memorandum opinion is issued there are three outstanding motions *in limine* that were filed by Defendant. However, as a result of the grant of summary judgment in favor of Defendant, those motions are now moot.